TESTIMONY
of
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Subcommittee on Criminal Justice, Drug Policy
and Human Resources

With regard to

"Current Issues Associated with the Faith Based Initiative"

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Introduction

Thank you, Chairman Souder and Ranking Member Cummings for the opportunity to address this hearing today. My name is Nathan Diament and I am privileged to serve as the director of public policy for the Union of Orthodox Jewish Congregations of America. The UOJCA is a non-partisan organization in its second century of serving the Jewish community, and is the largest Orthodox Jewish umbrella organization in the United States representing nearly 1,000 synagogues and their many members nationwide.

I come before you today to address several issues that are relevant to the recent efforts to expand the long-existing partnership between government and faith-based institutions in the United States: the first is the legality of government actions undertaken pursuant to the initiative under the most recent interpretations of the U.S. Constitution; the second issue relates to the religious liberty protections afforded to faith-based agencies and their beneficiaries, respectively, under the initiative's programs. But underlying both of these important legal discussions, is a more fundamental and philosophical discussion about the role of religious institutions in American society and the unprecedented, highly-disturbing efforts to undermine the longstanding liberties and protections afforded to these institutions.

Mr. Chairman, there has been a good deal of progress under the aegis of the faith-based initiative; but, as is often the case, there is a great deal of promise which remains to be fulfilled.

But let me first comment about the progress. After President Bush launched this initiative in the first month of his Administration, it became a political "Rorschach test," with some interest groups projecting their worst fears upon it.[1] The fact that this initiative raises complex and critical questions provided an opportunity for some to engage in, frankly, overheated fear-mongering rather than coolheaded discussion. The debate, as you know, became so heated that an initiative which had previously passed on bipartisan votes and upon which both presidential candidates in the 2000 election agreed,[2] garnered only a narrow party-line vote in this House and was promptly stalled in the Senate.

This legislative deadlock did not result in the abandonment of the President's effort to "level the playing field" so that faith-based groups could serve the needy more productively in partnership with the public sector. Rather, it drove the effort into the cabinet departments which, as you are aware, have worked to reform existing practices and issue new regulations to achieve some of the initiative's objectives.

These efforts have resulted in significant progress. They have resulted in important reforms which have not only opened up federal grant programs which support social welfare projects to faith-based groups, but have brought real equity to an array of critical federal programs throughout the government's activities. Allow me to illustrate with two representative examples.

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[1] *See*, Diament, *A Faith-Based Rorschach Test*, The Washington Post, March 20, 2001.

In the year 2000, a severe earthquake struck the northwestern United States. Among the scores of damaged buildings and homes was the Seattle Hebrew Academy in Washington State. Like all those who suffered, the Hebrew Academy applied to the Federal Emergency Management Agency for financial disaster relief funds. Despite meeting every other eligibility criterion, FEMA denied the Hebrew Academy funds because of its status as a religious institution. Many of us were shocked to learn of this FEMA policy. The earthquake did not discriminate among which institutions to strike, yet FEMA was discriminating in its relief efforts. Thankfully, the equal treatment philosophy of the faith-based initiative prompted the Administration to review and then reverse, by executive order, this policy of FEMA. No longer will religious facilities be denied their equitable share of aid should disaster befall them.

A similar issue arose within the Department of the Interior. The Save America's Treasures program was established in 1998 as a public-private partnership between the Interior Department's National Park Service and the National Trust for Historic Preservation to assist historically landmarked sites with their upkeep and preservation costs. But prior to 2003, the hundreds of religiously affiliated historic sites in this country were ineligible to apply on the basis of their religious status alone. This too seemed discriminatory and unfair. The competitive, religion-neutral, grants process is designed to ensure America's important architectural treasures are preserved for generations to come. A 2003

[2] *See* Remarks by Vice President Al Gore on the Role of Faith-Based Organizations, delivered to the Salvation Army, Atlanta, GA, May 24, 1999, accessible at http://www.conservativenews.org/specialreports/gore990525a.html

study by the National Trust found that the average historic congregation faces up to $2 million of repair costs. Again, the Administration reviewed and reversed this practice. Religious landmarks are not given favored status, but they are treated equally with their secular counterparts and will be preserved as well for future generations.[3]

Now, each of these policy changes is well grounded in detailed legal analyses,[4] some aspects of which I will touch upon momentarily. But more importantly, they are consistent with a fundamental and mainstream understanding that the constitutional proscription against the "establishment" of religion is not a license for the government to discriminate against religion, but an insistence upon the government's neutrality toward religion.[5] While some continue to contend that this understanding of the Constitution's religion clauses is incorrect, these critics are, in fact, outside the mainstream of current constitutional thinking – as evidenced by nothing less than the Supreme Court's most recent ruling involving its religion jurisprudence handed down less than thirty days ago.

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[3] Anticipating my discussion below, it is interesting to note that, despite the criticism from some interest groups, the concept of providing federal assistance for the physical preservation of religious and marks is sufficiently "mainstream," that new legislation has been proposed – with broadly bipartisan cosponsorship – to extend such programs further. *See* H.R. 1446, California Missions Preservation Act.

[4] *See* Department of Justice Office of Legal Counsel Memorandum Opinion for the General Counsel Federal Emergency Management Agency, September 25, 2002, accessible at http://www.usdoj.gov/olc/FEMAAssistance.htm; and Department of Justice Office of Legal Counsel Memorandum Opinion for the Solicitor Department of Interior, April 30, 2003, accessible at http://www.usdoj.gov/olc/OldNorthChurch.htm

[5] "'It has never been thought either possible or desirable to enforce a regime of total separation'…nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Of course, the main focus and goal of the initiative has not been to bring the prevailing constitutional doctrine of neutrality toward religion to historic preservation programs, or even disaster relief, but to better leverage the capacity of what President Bush called "America's armies of compassion" so that those in need are more adequately served. On this front, there appears to have been some progress. According to a recent Administration announcement, "grants to faith-based organizations increased substantially" over the last two fiscal years, at least in the two cabinet departments that have comparison data available.[6] On the surface, this certainly appears to be a positive trend, but I must defer to experts at data analysis such as Dr. Sherman to really uncover and analyze what progress is being made on the ground. Thus, I return to the issues associated with the initiative's constitutional acceptability.

The Constitutional Basis for Government's Neutrality

Support for this neutrality-centered view can be found in many Supreme Court precedents the most recent of which is *Locke v. Davey* decided just last month.[7] There, the Court reviewed a Washington State scholarship program which awarded scholarships to high school graduates based on three religiously neutral criteria: (i) the student graduated in the top 15% of his/her high school class; (ii) the student's family income must be less that 135% of the state's media; and (iii) the student must enroll in an

[6] http://www.whitehouse.gov/government/fbci/CompassionFS3-3-04.pdf

[7] 2004 U.S. Lexis 1626 (February 25, 2004).

accredited college or university within Washington State. Joshua Davey met all these criteria and was awarded a scholarship. The scholarship was revoked when he declared "devotional theology" as one of his two majors at an accredited Christian college. Washington asserted that its state constitution barred it from awarding a scholarship for someone, such as Davey, who was studying to become a minister. Davey sued the state, asserting that this was an infringement of his federal constitutional right to the Free Exercise of religion. Davey's claim was rejected by the U.S. Supreme Court on the grounds that the federal Free Exercise Clause does not trump Washington's state constitutional ban on publicly funding a person studying for the ministry.

But although the Court rejected Davey's claim, all nine justices unanimously endorsed the proposition that "there is no doubt that the State could, consistent with the Federal Constitution, permit [recipients of a government funded scholarship] to pursue a degree in devotional theology."[8] Moreover, the majority opinion, without concurrence or qualification by any justice, noted that the scholarship program "goes a long way toward including religion in its benefits. The program permits students [on scholarship] to attend pervasively religious schools…and…students are…eligible to take devotional theology courses."[9] The only bar is to accepting a state scholarship and taking such courses for the narrow purpose of becoming a member of the clergy.

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[8] 2004 U.S. Lexis at *12, emphasis supplied.

[9] 2004 U.S. Lexis *21.

This latest ruling from our highest court clearly indicates that the principle of government neutrality toward religion is the animating principle of the First Amendment's Establishment Clause.

It is also worth considering the Supreme Court's opinion in the 2001 case of *Good News Club v. Milford Central School,*[10] where the Court engaged in a more detailed discussion of the neutrality principle. There, the Court reviewed the policy of a New York school district that allowed its public school facilities to be used for meetings by a wide range of civic and youth groups after school hours, but refused to allow a Christian youth group, the Good News Club, to use facilities for its meetings due to their religious content. Among the reasons the school district offered in support of its policy was that it was necessitated by the Establishment Clause. The Court ruled, by a 6-3 vote, that the school district's policy of exclusion violated the Free Speech rights of the Good News Club and that the Establishment Clause provided no basis for tolerating this violation.

In its discussion of the Establishment Clause, the Court noted that it has "held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion."[11] Moreover, the Court noted that the suggestion that treating the religious youth group on an equal basis with secular groups "would do damage to the neutrality principle defies logic. For the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and

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[10] 533 U.S. 98 (2001).

[11] *Id.* at 114, *quoting Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 839 (1995).

evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'"[12]

The Court addressed several other aspects of the Establishment Clause challenge, the most relevant of which for this discussion is the concern over whether granting a religious entity a government benefit – even as a matter of neutrality – would be perceived as government endorsement of religion. The Court emphatically rejected this assertion stating: "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the…members of the audience might misperceive."[13]

While the question of to what degree religious groups may benefit from public resources was at issue in the *Good News* litigation, it is also the case that the government was being asked to permit a religious group to enjoy a relatively small and indirect benefit from public resources – the use of an otherwise empty public school classroom.[14] In the case of *Mitchell v. Helms*, decided the previous year,[15] the issue was whether the Establishment Clause would permit religious schools to benefit from government

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12 *Id.*

13 *Id.* at 119.

14 Another possible distinction is that the Good News Club possessed a compelling Free Speech claim in its case, that serves as a counterweight to the Establishment Clause concerns. The anemic reading of the Free Exercise Clause afforded by the current Court, *see City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), unfortunately provides no such counterweight, although it should.

15 530 U.S. 793, 120 S.Ct. 2530 (2000).

expenditures – arguably a closer analog to the issues raised in the faith-based initiative context.

In *Helms*, like *Good News*, six of the nine justices came down squarely on the side of the neutrality view of the Establishment Clause.[16] The issue before the Court was the constitutionality of a federal grant program which allows local education agencies to use federal funds for the purchase of supplementary educational materials, including textbooks and computers, for schools within their jurisdiction.[17] Because the aid was also made available to parochial schools within the jurisdiction, it was challenged as a violation of the Establishment Clause.[18] The Court rejected this challenge.

Justices Thomas, Rhenquist, Kennedy and Scalia rejected the challenge on the basis of a neutrality-centered understanding of the Establishment Clause without any qualifications. For these justices, so long as secular government aid is provided to religious institutions on the basis of religion-neutral criteria it does not violate the Establishment Clause, and the constitutionality of currently enacted and pending charitable choice laws is unquestionable.

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[16] This position is clearly enunciated by the plurality opinion of Justices Thomas, Rhenquist, Scalia and Kennedy and is at the core of the concurrence by Justices O'Connor and Breyer.

[17] Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97—35, 95 Stat. 469, as amended, 20 U.S.C.§ 7301—7373.

[18] Many public interest organizations, including the UOJCA, filed friend of the court briefs in the *Helms* case. Not surprisingly, those who question the neutrality principle today in the context of charitable choice also questioned it there. It is worth noting that the Solicitor General, on behalf of Secretary of Education Richard Riley, argued in support of the program's constitutionality. *See*, http://supreme.lp.findlaw.com/supreme_court/docket/decdocket.html#98-1648.

Justice O'Connor, joined by Justice Breyer, also invoked the principle of neutrality, but with qualifications.[19] Inasmuch as this concurrence was essential to the Court's holding, it can be said that it is the O'Connor opinion that is controlling in *Helms*. At the same time, it must be noted that Justice O'Connor did not write a concurring opinion in the *Good News* case taking exception to the majority's strong focus upon the neutrality principle – as she did in *Helms*.

Working with the framework she developed previously in *Agostini v. Felton*,[20] Justice O'Connor determined that the program at issue did not violate the Establishment Clause because it furthered a secular purpose, did not have the primary effect of advancing religion,[21] and did not raise the likelihood that an "objective observer"[22] would believe the program was a governmental endorsement of a particular religion. It is important to note that, as part of this analysis, Justice O'Connor, like the *Helms* plurality, explicitly rejected the precedents of *Meek v. Pittinger* [23] and *Wolman v. Walter*,[24] which had held

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[19] Justice O'Connor was not prepared to accept what she viewed as the plurality's "treatment of neutrality [as a] factor of singular importance" above other factors developed in the *Agostini* case. 120 S. Ct. at 2556.

[20] 521 U.S. 203 (1997), upholding a government funded program for secular special education teachers to teach in parochial schools. Writing for the Court's majority in *Agostini*, Justice O'Connor revised the much-maligned three prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[21] For Justice O'Connor, the question of whether an aid program has the primary effect of advancing religion is determined by whether: a. the aid is actually diverted for religious indoctrination; b. the eligibility for program participation is made with regard to religion; and c. the program creates excessive administrative entanglement.

[22] Justice O'Connor's "objective observer" is not the typical person on the street, but a person "acquainted with the text, legislative history, and implementation of the statute." *Wallace v. Jaffree,* 472 U.S. 38, 76 (1985).

[23] 421 U.S. 349 (1975).

[24] 433 U.S. 229 (1977).

even the capability for (as opposed to the actual) diversion of government aid to religious purposes to be sufficient grounds to render an otherwise neutral aid program an Establishment Clause violation.[25] Finally, Justice O'Connor stressed that the aid provided under the education grant program was "secular, neutral and non-ideological," supplemented funds from private sources, and was expressly prohibited from being used for religious instruction purposes.[26]

Taking all of these precedents together, it is clearly permissible to construct a regime under which faith-based organizations may receive government social service grants. This regime is evidenced in the previously enacted charitable choice laws as well as the regulations promulgated by the Cabinet Departments. The eligibility criteria for receiving a grant are religion neutral. The grant program serves the secular purpose of providing social welfare services to needy individuals. The grant funds are expressly prohibited from being "expended for sectarian worship, instruction or proselytization." And Justice O'Connor's sophisticated "objective observer" would not believe that government support for the faith-based provider under these programs constituted the endorsement of the particular religion.

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[25] 120 S. Ct. at 2558. Justice O'Connor notes that the plurality bases its reasoning for this point on the Court's precedents that have allowed government aid to be utilized to access religious instruction, specifically *Witters v. Washington*, 474 U.S. 481 (1983), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). O'Connor correctly notes that those cases relied heavily on the "understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," 120 S. Ct. at 2558, as opposed to a per-capita, direct aid program at issue in *Helms*.

[26] 120 S. Ct. at 2569.

Free Exercise of Religion Considerations; For Program Beneficiaries

There are other safeguards in charitable choice laws and regulations that are not necessitated by the Establishment Clause, but by the Constitution's Free Exercise Clause – a feature of the First Amendment that ought to carry equal weight to the Establishment Clause but, for a variety of reasons, often seems forgotten – even by the Supreme Court.[27]

As members of a minority religion in this country, we in the Orthodox Jewish community are terribly sensitive to the issue of religious coercion in general, and certainly in situations where government support, albeit indirect, is involved. We believe government should bolster the "first freedom" of religious liberty at every opportunity. Thus, we would insist that there be adequate safeguards to prevent any eligible beneficiary from being religiously coerced by a government-supported service provider. We believe that a requirement that each beneficiary be entitled to a readily accessible secular alternative service program and that each beneficiary be put on specific notice that they are entitled to such an alternative is the proper method for dealing with this issue. Moreover, as a condition for receiving federal assistance, faith providers must agree not to refuse to serve an eligible beneficiary on the basis of their religion or their refusal to hold a particular religious belief. We were, therefore, disappointed that the regulations promulgated by some Cabinet agencies under this initiative did not contain safeguards to the level of strength which had been offered in the legislation derailed by

[27] The Court's current apathy toward the Free Exercise Clause began with *Employment Division v. Smith*, 474 U.S. 872 (1990), resulting in the passage of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb. "RFRA" was struck down by the Court in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) to which congress responded in 2000 with the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc.

the initiative's critics in 2001.[28] In particular, the regulations now governing the SAMSHA program[29] recognize that an entity receiving SAMSHA funds may not discriminate against an eligible recipient in the provision of service, including when a recipient refuses to participate in a religious practice. However, the regulation denotes a refusal to "actively" participate in a religious practice. This may open the door to inappropriate circumstances in which vulnerable recipients are exposed to religious practices even when they are passive. Had H.R.7 been enacted in the 107th Congress, this issue would not be of concern for the law would have contained protections against both active and passive religious participation that is unwanted.

Still, in the main, the Administration and the Cabinet Centers must be commended for developing regulations and procedures sensitive not only to what is permissible by law, but appropriate in the spirit of this enterprise and American principles of religious liberty and pluralism.

Free Exercise of Religion Considerations; For Faith-Based Providers

There are also critical religious liberty considerations with regard to the protections afforded to religious organizations by the Constitution and federal laws. As you are already aware, the one that has received considerable attention from critics of the faith-

[28] Some have suggested that allowing a beneficiary to opt out of the faith-related portions of a faith-based agency's program while being entitled to partake of the secular portions of the program is an appropriate safeguard. We believe this is insufficient. It would force beneficiaries to constantly assert their objection in contexts where that might be difficult, if not awkward. The best safeguard, in the view of the UOJCA, for the religious "objector" is to facilitate his or her participation in an acceptable alternative program as was proposed in H.R.7 §201(f)(1) of the last Congress.

[29] Issued in 2003, 42 CFR Parts 54, 54a; 45 CFR Part 96.

based initiative is the thirty-seven year old federal law,[30] embodied in the Civil Rights Act of 1964, permitting religious organizations to hire employees on the basis of religion.[31] I have attempted to address the incendiary charge of "discrimination" leveled by opponents of faith-based organizations enjoying this civil right in prior testimony to committees of this House and will not recite it again here.[32]

But I would care to raise for the Subcommittee's attention a recent development in California which brings not the promise, but the peril facing America's faith-based social welfare agencies into sharp relief should the logic of the critics' arguments win the day.

Some of you may already be aware, that on March 1st, the California Supreme Court declared Catholic Charities of California, as a matter of law, to not be a religious organization.[33] This question came before the court as a result of a state law enacted to require any employer offering prescription drug benefits in its employees' health plans to

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30 A 2001 survey conducted by the Pew Forum on Religion and Public Life noted broad support for the faith-based initiative overall, but concerns over permitting religious social service providers to receive government funds while continuing to possess the right to hire on the basis of religion. At no point, however, was any information offered to the respondents apprising them of the limited nature of the exemption, *see below*, or its creation as part of the Civil Rights Act of 1964. *See*, http://pewforum.org/events/0410/report/topline.php3.

31 Section 702 of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e-1, provides in relevant part: "This subchapter shall not apply…to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

32 *See* Statement of Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America, Testimony Before the Subcommittee on Human Resources and Subcommittee on Select Revenue Measures of the House Committee on Ways and Means Hearing on H.R. 7, the "Community Solutions Act of 2001"June 14, 200, accessible at http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/hr-6wit.htm. *See also,* Diament, *A Slander Against Our Sacred Institutions*, The Washington Post, May 28, 2001.

include coverage for prescription contraceptives. Although the legislature provided an exemption from this law to religious employers, for an entity to qualify as such, it must be a non-profit corporation which: (1) Has the inculcation of religious values as its purpose; (2) primarily employs only people of the entity's faith; and (3) serves primarily people of the entity's faith. In other words, Catholic Charities – in its homeless shelters, job training programs, soup kitchens, AIDS hospices, child care centers and countless other agencies – must only employ Catholics to serve Catholics and seek to convert its non-Catholic beneficiaries into Catholics.

Now, as stated by The New York Times' "Beliefs" columnist, it is

> noteworthy that the criteria that disqualified Catholic Charities in California from a religious exemption are precisely the ones regularly hailed by those who felt that the existing relationship between government and religious organizations was satisfactory and did not need the White House's religion-based initiative. Catholic Charities did not limit to Catholics either its hiring or its social services. It did not proselytize. And it was organized as a type of nonprofit corporation distinct from the church. This was the kind of well-tested model that critics of the religion-based initiative urged on churches that wanted to qualify for government aid to expand their activities on behalf of the needy.[34]

This characterization, however, by the Times' writer is a polite understatement, for it fails to note that these very critics who in the halls of this Congress hailed Catholic Charities as the proper paradigm for publicly funded faith-based social service filed legal briefs with the court in opposition to Catholic Charities and urging the court to rule as it has.[35]

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[33] *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento et. al.*, March 1, 2004, accessible at http://www.courtinfo.ca.gov/opinions/documents/S099822.PDF

[34] Steinfels, *Making the Case for a Religious Exemption*, The New York Times, March 13, 2004.

[35] Americans United for Separation of Church and State, the Anti-Defamation League and the ACLU were among those filing "friend of the court" briefs against Catholic Charities. *Supra*, note 30.

The California court's ruling was, I would submit, properly characterized by the eminent constitutional law professor Douglas Laycock as "a shocking interference with church internal affairs."[36]

The fact that this ruling was advocated by the critics who have presented their objections to the legislative and regulatory steps undertaken to advance the faith-based initiative as limited and nuanced, begs the question as to what these critics' real objectives are. I would submit that, if they had their way, they would accept not only the reversal of the progress made under the current and previous Administration, but would seek to roll back long established liberties and privileges accorded America's religious institutions including tax exemptions and other legal accommodations to a degree at odds with mainstream American jurisprudence or popular consensus.[37]

Conclusion

Since the inception of "charitable choice" and the faith-based initiative, the debates associated with these efforts come down to questions of cynicism versus hope. The cynics see a slippery slope down every path; some see deeply religious people as untrustworthy – incapable of following regulations and perpetually plotting to proselytize

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[36] *Catholic Group is Told to Pay for Birth Control*, The New York Times, March 2, 2004.

[37] The next stage of this assault on longstanding and broadly accepted benefits which have been enjoyed by religious institutions is also working its way through California's courts – with the active participation critics of faith-based initiative. On March 9, 2004, an intermediate appellate court in California found the facilitation by public authorities of the issuance of tax-exempt bonds to finance facilities improvement projects at religiously affiliated schools to violate the California Constitution. *Calif. Statewide Comm. Devel. Authority v. All Persons Intersted*, 2004 WL 424166 (Cal.App. 3 Dist.).

their neighbor, while others see every civil servant as a regulator lacking restraint just waiting to emasculate America's religious institutions.

But if we set our minds -- and our hearts -- to it, we can find a way to be more hopeful. After all, what this is really about is bringing some new hope and some real help to people in need through a new avenue.